No. 93-714

In The

Supreme Court of the United States

October Term, 1993

U.S. BANCORP MORTGAGE COMPANY,

Petitioner,

v.

BONNER MALL PARTNERSHIP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S REPLY TO RESPONSE OF PETITIONER

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Both Bonner Mall and U.S. Bancorp have agreed that this case has been rendered moot in light of the Bankruptcy Court's confirmation of a plan of reorganization that does not implicate the "new value" principle, the issue upon which this Court granted certiorari. U.S. Bancorp further requests that the Court vacate the decree below, citing this Court's decision in *United States v. Munsingwear Inc.*, 340 U.S. 36, 39-41 (1950). U.S. Bancorp's reliance on *Munsingwear*, however, is misplaced. In *Munsingwear*, the controversy before the Court had become moot due to a change in government regulations over which the parties had no control. The Court held that vacating the judgment below was proper because review of it "was prevented through happenstance". 340 U.S. at 40, 71 S.Ct. at 107. The Court reasoned that it would be an unfair hardship for the parties to be bound by a decision that was rendered unreviewable due to circumstances beyond their control. *Id.*

In this case, by contrast, U.S. Bancorp and Bonner Mall have resolved their differences consensually through the form of a settlement. The fact that this case has now been rendered moot results solely from the voluntary actions of all parties.

In *Karcher v. May*, 484 U.S. 72, 108 S.Ct. 388 (1987), this Court rejected a request to vacate a lower court decision when the case before the Court had been rendered moot because a losing party voluntarily abandoned its right to appeal. The Court noted that the "controversy did not become moot due to circumstances unattributable to any of the parties." 484 U.S. at 83, 108 S.Ct. at 395. Rather, the case became moot because the losing party

below decided not to pursue its rights. Because the fairness considerations espoused by the Court in *Munsingwear* were not implicated, the Court held the "the *Munsingwear* procedure is inapplicable to this case." *Id.*

In the context of consensual settlements, the Courts of Appeal consistently have held that the *Munsingwear* rule and the rationale underlying it do not apply. *See, e.g., Arthur v. Manch*, 12 F.3d 377 (2d Cir. 1993); *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381 (2d Cir. 1993); *Oklahoma Radio Assocs. v. F.D.I.C.*, 3 F.3d 1436, 1439 (10th Cir. 1993); *In re United States*, 927 F.2d 626 (D.C. Cir. 1991); *In re Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988). As the District of Columbia Circuit held in *In re United States*, "[w]here the losing party chooses to settle rather than to pursue its appeal, review is not prevented by 'happenstance' " as was the case in *Munsingwear*. 927 F.2d at 628.

The policy underlying the circuit courts' reasoning is strong. Vacating a lower court opinion in the absence of any hardship to the parties would constitute a waste of judicial resources and serve no benefit. *See Oklahoma Radio Assocs.*, 3 F.3d at 1444; *Clark Equipment Co. v. Lift Parts Mfg. Co.*, 972 F.2d 817, 820 (7th Cir. 1992); *see also Isumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Co.*, 114 S.Ct. 425, 431 (1993) (per curiam) (Stevens, J., dissenting from dismissal of certiorari as improvidently granted). As the Seventh Circuit noted in *In re Memorial Hospital*:

> The bankruptcy and district judges devoted many hours to this case and resolved it on the merits. Their decisions have persuasive force as precedent that may save other judges and litigants time in future cases. Some of this force would remain as long as the court's opinion were available to read; it does not vanish on vacatur, although such an order clouds and diminishes the significance of the holding.

862 F.2d at 1302. In addition, permitting the parties to vacate a lower court opinion as part of a settlement could lead to substantial abuses, such as "allow[ing] a party with a deep pocket to eliminate an unreviewable precedent it dislikes simply by agreeing to a sufficiently lucrative settlement to obtain its adversary's cooperation in a motion to vacate." *Yanakas*, 11 F.3d at 384; *Oklahoma Radio Assocs.*, 3 F.3d at 1444.

For the reasons set forth herein and in the "Memorandum of Respondent Suggesting that the Case is Moot" the Respondent respectfully suggests that this Court should dismiss the case as moot, but should decline the U.S. Bankcorp's request to vacate the opinions below.

DATED this 16 day of March, 1994.

/s/ Barbara Buchanan
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